IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 15847 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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KIRITBHAI PRAHLADBHAI RATHOD

Versus

STATE OF GUJARAT

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Appearance:

1. Special Civil Application No. 15847 of 2003

MR HR PRAJAPATI for Petitioner No. 1

MS PAURAMI SHETH Ld. AGP for Respondent No. 1-3

MS PJ DAVAWALA for Respondent No. 4

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CORAM : HON'BLE MR.JUSTICE N.G.NANDI

Date of decision: 05/02/2004

ORAL JUDGEMENT

1. Heard Mr.H.R.Prajapati, learned advocate for the petitioner, Ms.Paurami Sheth, learned AGP for the respondent nos.1 to 3 and Ms.P.J.Davawala, learned advocate for respondent no.4.

2. By this petition under Article 226 of the Constitution of India, the petitioner (detenu) has been challenging the detention order dated 5.6.2003 (Annexure-A) passed by respondent no.2 under the provisions of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act,1980 (hereinafter referred to as "the Act") and prays for setting aside of the impugned detention order being illegal, invalid, null and void, arbitrary and violative of Articles 14, 21 and 22 of the Constitution of India.

3. As per the impugned detention order, the petitioner kept the stock of diesel and solvent unauthorizedly and has been dealing in the unauthorized purchase and sale of diesel, liquid like diesel and solvent in the name and style of Jay Ranchod Chemical Industries Ltd. as the main partner thereof, and the petitioner has been attending day to day partnership business. That raid was carried out at the business premises wherefrom LDO 49630 ltr., liquid resembling diesel 63800 ltr. and LDO 23200 ltr. along with three tankers were seized. It has been the say of the respondent that the sale and purchase of LDO required a licence from the respondent which the petitioner did not obtain and with a view to indulging in black marketing of these articles, the petitioner has been maintaining the stock of the aforesaid articles and thereby, the petitioner has been dealing in the activities of the black marketing in the essential commodities / articles aforestated.

4. It is submitted by Mr.Prajapati, learned advocate for the petitioner that the impugned order of detention is liable to be quashed without entering into the other grounds, on the ground that there is no subjective satisfaction as regards the petitioner likely to obtain the bail and after getting himself released on bail, he would indulge in the activities violative of the provisions of the Act. It is further contended that there is no material to suggest that the petitioner would apply for bail and would get himself released on bail and therefore, the impugned order of detention is liable to be quashed as it cannot be said that the authority concerned has reached the subjective satisfaction for want of sufficient material.

In the grounds of detention (Annexure-B) activities indulged in by the petitioner have been pointed out. It is submitted by Ms.Sheth, learned AGP that looking to the grounds stated in Annexure-B, it is necessary to have preventive measure by invoking Section 3(1)(2) of the Act. It is further submitted that the grounds suggest that the material available with the Detaining Authority on the basis of which it is in the interest of the Society to take the petitioner in detention immediately. So, in substance, it has been submitted by Ms.Sheth that Annexure-B suggests the material available with the Detaining Authority for invoking the provisions of Section 3(1)(2) of the Act as a preventive measure.

5. In Para.13 of Annexure-B, it has been stated that if the petitioner is prosecuted u/s 7 for the breach of Section 3 of the Act, then in those proceedings there is every likelihood that the petitioner would get himself released on bail and after getting himself released on bail, he would continue to indulge in the same illegal activities and taking action under the penal law is a time taking process and therefore, it is necessary to take preventive measures with immediate effect and therefore, the action under the penal law appears insufficient.

6. Dealing with the same situation, the learned Single Judge of this Court in Special Civil Application No.293 of 2003 held that the Detaining Authority failed to state the material on which it found that the petitioner would apply for bail and would get himself released on bail and thereafter, would continue to indulge in the same activities.

7. On behalf of the respondents reliance has been placed on the decision in the case of Phulwari Jagdambaprasad Pathak Vs. R.H.Mendonca and Others, (2000) 6 SCC 751 and contended that there is sufficient material available on record with the Detaining Authority for invoking Section 3 of the Act as a preventive measure for maintenance of "public order". As far as the proposition of law laid down by the Apex Court is concerned, there cannot be any disagreement with it. In the case before it, the situation was as regards the availability of material for passing the detention order by the Detaining Authority. In the instant case, the question is whether there was sufficient material with the Detaining Authority to reach a subjective satisfaction as regards the petitioner applying for bail and after getting released on bail would indulge in the

same activities over again. It is not disputed that in the instant case the prosecution under the penal law has not been initiated, so there is no question of petitioner applying for bail muchless getting himself released on bail.

8. In the case of Amritlal and Other Vs. Union Government through Secretary, Ministry of Finance and Others, AIR 2000 SC 3675 it has been held that, "there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. Likelihood of detenu's moving an application for bail is not a cogent material and detention order based on such material is liable to be quashed. The reasoning that there is "likelihood to be released on bail" is different from "likelihood of his moving an application for bail".

In the instant case, as pointed out above, all what has been stated is that if action under the penal law is taken the same would be time taking and the petitioner would move the application for bail, and would get himself released on bail, and would indulge in the acts alleged against him again. There is no material on record for reaching the subjective satisfaction as regards the applicant likely to move for bail. It may be stated at the cost of repetition that in the instant case, prosecution has not been initiated against the petitioner. Therefore, there is no material which would suggest subjective satisfaction of the Detaining Authority on this core.

9. Under the circumstances, following the principle laid down in the case of Amritlal (Supra) the impugned order of detention is liable to be quashed and set aside.

10. In the result, the petition is granted and accordingly allowed. The impugned order of detention dated 5.6.2003 (Annexure-A) passed by respondent no.2 against the petitioner -detenu -Kiritbhai Prahladbhai Rathod is hereby quashed and set aside. The petitioner -detenu is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly. Direct service is permitted.

(N.G.Nandi,J.)

(vipul)